Office-Supreme Court, U.S.
FILED
FEB 3 1965
JOHN F. DAVIS, CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1964

## No. 872

EARLINE ALLEN, individually and as Administratrix of the Estate of Jessie Delton Allen, Deceased,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

MARTIN J. JARVIS,
123 Second Street,
San Francisco, California 94105,
*Counsel for Petitioner.*

MARVIN STENDER,
123 Second Street,
San Francisco, California 94105,
*Of Counsel.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Index to Petition


| | Page |
|---|---|
| Citations to opinions below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement of the case | 3 |
| Reasons for granting a writ | 5 |
| Conclusions | 8 |
| Appendix A | i |
| Appendix B | ii |


## Table of Cases Cited


| | Pages |
|---|---|
| The Harrisburg, 119 U.S. 199 | 4, 5, 6, 7 |
| Mejia v. United States, 152 F.2d 686 | 4, 7 |
| Western Fuel Co. v. Garcia, 257 U.S. 233 | 4, 7 |
| Wohlgemuth v. Meyer, 139 C.A.2d 326, 293 P.2d 816 | 5, 7 |


## Statutes Cited


| | Pages |
|---|---|
| California Code of Civil Procedure: | |
| Section 335 | 2 |
| Section 340 | 2 |
| Section 340(3) | 3 |
| 28 U.S.C., Section 1254(1) | 2 |
| Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 933(b) | 4 |
| Jones Act, 46 U.S.C., Section 688 | 5 |
| Suits in Admiralty Act, 46 U.S.C., Section 745 | 2, 3, 6 |
| Death on the High Seas Act, 46 U.S.C., Section 761 et seq. | 5 |
| Public Vessels Act, 46 U.S.C.: | |
| Section 781 | 2, 3, 6 |
| Section 782 | 2, 3, 6 |

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1964

No.

EARLINE ALLEN, individually and as Administratrix of the Estate of Jessie Delton Allen, Deceased,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on November 5, 1964.

## CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 42) is unreported and is printed in Appendix B hereto, *infra*, p. ii. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. xii, is reported in 338 F. 2d 160.

---

## JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1964 and is printed in Appendix B hereto, *infra*, p. xxi. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

---

## QUESTION PRESENTED

Whether the uniformity of the admiralty law precludes the application of a state statute of limitations to an admiralty action for death occurring within the navigable waters of a state.

---

## STATUTES INVOLVED

The Statutory Provisions involved are portions of The Public Vessels Act, 46 U.S.C. §§781 and 782; The Suits in Admiralty Act, 46 U.S.C. §745; and The California Code of Civil Procedure §§335 and 340.

They are printed in Appendix A, *infra*, p. i.

## STATEMENT OF THE CASE

Petitioner instituted this action in admiralty in the District Court pursuant to the Public Vessels Act (46 U.S.C. §781 et seq.) seeking damages for wrongful death of petitioner's husband, Jessie Delton Allen (decedent). The libel alleges that decedent was working aboard the U. S. N. S. General Edwin D. Patrick, a public vessel of the United States, as a seaman in the capacity of a ship's painter, employed by Bethlehem Steel Corporation, when he suffered injuries resulting in death. The vessel at the time was afloat in navigable waters of California. It is alleged that the injuries and death were caused by the negligence of the United States and the unseaworthiness of its vessel. The libel was filed more than one year but less than two years from the date of injury and death.

Respondent's amendment to answer sets forth the affirmative defense that the libel was time barred by the one year limitations period of the California wrongful death act (California Code of Civil Procedure §340 (3)).

Petitioner filed exceptions to this defense arguing that the action was governed by the two year limitations period of the Suits In Admiralty Act (46 U.S.C. §745) which is incorporated by reference into the Public Vessels Act.[1]

---

[1] ". . . such suits shall be subject to and proceed in accordance with the [the Suits in Admiralty Act] . . . ." 46 U.S.C. §782.

The District Court overruled petitioner's exceptions[2] The District Court's opinion (Appendix B, *infra*, p. ii) recognized that the two year limitations period of the Suits In Admiralty Act is applicable, for most purposes, to actions brought under the Public Vessels Act. However the court held that since the tort occurred on navigable waters of the State of California Admiralty must, in adopting the state's wrongful death act, accept that act with all of its conditions including the one year limitations period. The libel was thereupon dismissed as untimely (R. 58).

The Court of Appeals affirmed, Appendix B, *infra*, p. xii), holding that an admiralty action for wrongful death based upon a tort committed upon the navigable waters of a state must rely on the state created right of action and that the cause of action is subject to the state's limitations period. The Court of Appeals rejected petitioner's contention that the cases establishing this rule (*The Harrisburg*, 119 U.S. 199; *Western Fuel Co. v. Garcia*, 257 U.S. 233; *Mejia v. United States*, 152 F.2d 686) were explicitly based on state court holdings interpreting the limitations period of the states' wrongful death act as being "limitations on the right" to bring the action and not merely "bars to the remedy"; while the courts of

[2]Petitioner had also excepted to the affirmative defense that the libel was time barred by a six month limitations period of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §933(b). These exceptions were sustained by the District Court (R. 52-53). Respondent took no cross-appeal from this decision.

California have expressly held that the limitations period in its wrongful death act is not a "limitation on the right" or a "condition precedent" to bringing the action but is a statute of limitation in the true sense which may be waived or tolled (*Wohlgemuth v. Meyer,* 139 C.A. 2d 326, 293 P. 2d 816).

---

**REASONS FOR GRANTING A WRIT**

1. The question presented is of importance to the constitutional imperative of a uniform, national admiralty law. If separate state periods of limitation are to govern a large class of death actions, disuniformity will be introduced into the admiralty law at the most fundamental level.

In the absence of a specific statute no action for wrongful death will lie under the General Maritime Law *(The Harrisburg,* 119 U.S. 199). This void has been filled by a variety of statutes which provide for wrongful death actions in specific situations.[3] These statutes each contain a specific limitations period which evidence a congressional intent to provide uniform procedures for enforcing the causes of action granted. However for deaths occurring upon the navigable waters of a state the admiralty law must look to the wrongful death act of the state in question. To hold that the enforcement of such a cause of action

---

[3]The Jones Act, 46 U.S.C. §688; The Death on the High Seas Act, 46 U.S.C. §761 et seq.

must be made dependent upon the vagaries of the limitations periods in the wrongful death acts of the various states introduces a serious disuniformity in a broad class of maritime actions. The effect of thus frustrating national policy is even more clearly seen in an action such as this against the United States where Congress has specifically adopted a two-year limitations period for maritime torts arising out of the operation of public vessels.[4] The anachronism of providing a lesser quantum of protection to the wards of the admiralty in death actions than in actions for damages for injuries less than death illustrates the importance of uniform national procedures to govern admiralty matters. Although an accident of legal history necessitates that admiralty borrow the wrongful death act of the state, it is the breach of a maritime duty which is being urged. Both the definition of the duty and the procedures for its enforcement should be uniform and not dependent upon the place where the tort was committed.

2. The decision of the court below is believed to be erroneous and based upon a misinterpretation of the holding in *The Harrisburg,* 119 U.S. 199. *The Harrisburg* held that in a wrongful death action in ad-

---

[4]The Public Vessels Act authorizes an action in admiralty against the United States, ". . . for damages caused by a public vessel of the United States . . . ." 46 U.S.C. §781. ". . . such suits shall be subject to and proceed in accordance with the provisions of [the suits in Admiralty Act] . . . ." 46 U.S.C. §782. The Suits in Admiralty Act which is thus incorporated by reference into the Public Vessels Act provides: "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . . ." 46 U.S.C. §745.

miralty, brought pursuant to a state wrongful death statute, the admiralty must accept the state's interpretation of the limitations period in its wrongful death statute as being one which bars the right and hence extinguishes the cause of action. This holding of *The Harrisburg* was specifically based upon prior interpretations placed upon the state's wrongful death statute by the courts of the state to the effect that the limitations period was a condition attached to the cause of action. This rationale for the holding was followed in *Western Fuel Co. v. Garcia,* 257 U.S. 233 and in *Mejia v. United States,* 152 F.2d 686.

California, however, has definitely construed the limitations period in its wrongful death act as being a procedural bar only and not a condition precedent to the right granted. *Wohlgemuth v. Meyer,* 139 C.A. 2d 326, 293 P.2d 816.

Since the adoption of the state limitations period is not required on the basis of California's interpretation of its statute the court below erred in failing to adopt the statute of limitations in the federal act pursuant to which this action is brought.

## CONCLUSIONS

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
February 2, 1965.

Respectfully submitted,
MARTIN J. JARVIS,
*Counsel for Petitioner.*

MARVIN STENDER,
*Of Counsel.*

**(Appendices A and B Follow)**

## Appendix A

### PUBLIC VESSELS ACT

46 U.S.C. §781:

"A libel in personam in admiralty may be brought against the United States, * * *, for damages caused by a public vessel of the United States, * * *."

46 U.S.C. §782:

"Such suit shall be brought in the district court of the United States for the district in which the vessel, * * * charged with creating the liability is found within the United States, * * *. Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, * * *."

### SUITS IN ADMIRALTY ACT

46 U.S.C. §745:

"Suits as authorized by this chapter may be brought only within two years after the cause of action arises: * * *."

### CALIFORNIA CODE OF CIVIL PROCEDURE

"§335. Periods of Limitation Prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

"§340. One year.

"1. * * *.

"2. * * *.

"3. * * *. An action for * * * the death of one caused by the wrongful act or neglect of another, * * *."

## Appendix B

In The United States District Court for the Northern District of California, Southern Division

| | |
|---|---|
| Earline Allen, as administratrix of the estate of Jessie Delton Allen, deceased, and Earline Allen, individually, Libelant, vs. The United States of America, a sovereign nation, Respondent. | No. 28720 (Adm.) |

### MEMORANDUM OF DECISION

Libelant, as administratrix of the estate of her deceased husband and as an individual, sues the United States in admiralty under The Public Vessels Liability Act, 46 U.S.C. Sec. 781 et seq., and the Suits in Admiralty Act, 46 U.S.C. Sec. 741 et seq., to recover damages for the death of her husband, an employee of Bethlehem Steel Company, allegedly caused within the navigable waters of California by the negligence of the respondent and the unseaworthiness of its public vessel.

Respondent has impleaded Bethlehem Steel Comany, the employer of decedent, alleging that at the time of the accident Bethlehem had the exclusive control and

custody of the vessel in question and that any injury to decedent was the result of the negligence of Bethlehem in breach of its contractual obligation to respondent to perform its work aboard the vessel in a workmanlike and careful manner.

The case is before the Court upon Libelant's Exceptions to Respondent's Amendment to its Answer wherein respondent pleads: 1) that the action is barred by the California statute of limitations, C.C.P. Sec. 340(3) and, 2) that libelant, having accepted an award of death benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 and having failed to commence this libel within six months after the award the libel is barred by Sec. 933(b) of that Act.

## The California Statute of Limitations

No action for wrongful death will lie under the general maritime law but it has been well established that admiralty will recognize and enforce such a right of action when the act causing death occurs within the navigable waters of a state whose statutes give a right of action for wrongful death. *The Harrisburg,* 119 U.S. 199 (1886); *Western Fuel v. Garcia,* 257 U.S. 233, 242 (1921); *American Stevedores v. Porello,* 330 U.S. 446, 458-60 (1946).

The law of California gives a right of action for wrongful death, C.C.P. Sec. 377.

This suit is based upon that statute and also upon the Public Vessels Liability Act, 46 U.S.C. Sec. 781, authorizing libels in personam against the United

States for damages caused by a public vessel of the United States and the Suits in Admiralty Act, 46 U.S.C. Sec. 742, authorizing libels in personam against the United States, in cases where, if such vessel were privately owned or operated a proceeding in admiralty could be maintained.

California law provides that for wrongful death an action must be commenced within one year from the time the cause of action accrues, C.C.P. Secs. 335, 340(3).

This action, commenced January 9, 1963, to recover for a death occurring July 26, 1961, would, therefore, be outlawed under California law.

Libelant relies upon a provision of the Public Vessels Act, 46 U.S.C. Sec. 782, which provides that suits under the Act shall be subject to and proceed in accordance with the provisions of the Suits in Admiralty Act, 46 U.S.C. Sec. 741 et seq., which provides, Sec. 745, that suits authorized by it may be brought within two years after the cause of action arises.

Although it has been held that the limitations period of the Suits in Admiralty Act is incorporated by reference into the Public Vessels Act, for certain purposes (Phalen v. United States, 32 F. 2d 687 (2d Cir. 1929)), it has also been held that the state statute of limitations applies when the admiralty court is proceeding under a state created cause of action for wrongful death.

This has been specifically held in *Western v. Garcia,* supra (a maritime wrongful death suit between private parties), and in *California Casualty v. United*

*States,* 74 F. Supp. 401 (S.D. Cal. 1947), (a similar suit against the United States, under the public Vessels Liability Act).

Each of these wrongful death cases involved the identical California Statute of Limitations here in question. (See also: Mejia v. United States, 152 F. 2d 686 (5th Cir. 1945); The T[illegible]gus v. Skovgaard, 358 U.S. 588, 592 (1958); Hess v. United States, 361 U.S. 314, 320 (1959); Continental Casualty v. The Benny Skou, 200 F. 2d 245 (4th Cir. 1952); McMahon v. Pan-American, 297 F. 2d 268 (5th Cir. 1962)).

The rationale of these cases is that in actions for wrongful death brought in admiralty in which the Court must look to and follow a state created right of action for such death, the Court must adopt and enforce such right as an integrated whole with whatever conditions and limitations the creating state has attached.

Libelant relies on *State of Maryland v. United States,* 165 F. 2d 869 (4th Cir. 1947), a non-maritime action for wrongful death brought under the Federal Tort Claims Act, 28 U.S.C. Sec. 1346(b), which authorizes actions for damages against the United States in tort cases where the United States, if a private person, would be liable to the claimant under the law of the place where the act or omission occurred.

It was held that for reasons of statutory interpretation the limitations period of the Tort Claims Act, itself, rather than the state limitations period, is applicable to such suits. (See also, Sweet v. United States, 71 F. Supp. 863 (S.D. Cal. 1947)).

In State of Maryland, supra, at 874 however, the Court, citing Mejia v. United States,. supra, noted that a different rule is applicable to maritime wrongful death actions for the reason that admiralty may not adopt a state law without adopting its limitations and conditions.

Libelant further argues that the cases which have established this admiralty rule (The Harrisburg, supra, Western v. Garcia, supra, Mejia v. United States, supra) contain language indicating that their holdings were based upon the ground that the state statutes of limitation there involved were deemed to be limitations upon the right of action, itself, as distinguished from bar to the remedy.

Libelant points out that the California Court in Wohlgemuth v. Meyer, 293 Pac. 2d 816 (D.C.A. 1956) has held that its wrongful death one year limitation statute, C.C.P. Sec. 340(3), being a bar to the remedy, rather than a limitation upon the right of action itself, and being therefore, procedural, can be tolled for reasons that would toll other statutes of limitation.

However, the mere description of a state statute of limitations as procedural for some purpose is not necessarily a determination of the question whether a federal or a state rule of limitation should apply when the federal court's adjudication is dependent on the existence of a state created right. The real test is not whether a state statute of limitation is deemed a matter of procedure in some sense, but whether such a statute concerns merely the manner and the means

by which a right to recover, as recognized by the state, is enforced or whether such statutory limitation is a matter of substance in the aspect relevant to a particular problem, namely, does it significantly affect the result of litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties as a state court. (Guaranty Trust v. York, 326 U.S. 99 (1945).)

Although the pending suit is not a diversity case, as was Guaranty, it is a suit in which the federal court sitting in admiralty, is dependent for its adjudication upon a state created right of action for wrongful death. The foregoing test is, therefore, applicable and, when applied it leads to only one conclusion, namely, that the California limitations statute, which is certainly a bar to the remedy (absent circumstances tolling it) does significantly affect the result of litigation and is not of a mere remedial character. Therefore, admiralty, which under the decisions "must enforce the right as an integrated whole with whatever conditions and limitations the creating state has attached", (Tungus v. Skovgaard, supra) must apply the state statute of limitations applicable to the state created wrongful death right of action.

For the foregoing reasons and in view of the long established weight of authority upon the question, the Court concludes that libelant's exceptions to the first defense pleaded by respondents' amended answer should be overruled.

## The Longshoremen's and Harbor Workers' Compensation Act

We now take up the exceptions to the second defense above mentioned that, libelant, having been awarded and having accepted a death benefit from decedent's employer, Bethlehem Steel Company, under the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. Sec. 901, and having failed to commence this action against respondent as a third party liable in damages—within six months after such award, is barred under Sec. 933(b) of said Act from bringing this action.

Section 933, as amended in 1959, after providing that a person entitled to compensation need not elect whether to receive such compensation or to recover damages against a third person, further provides that acceptance of such compensation shall operate as an assignment of the right of action to the employer unless such person commences an action against the third person within six months after such award.

In the pending case respondents allege that on March 21, 1962, libelant was awarded and accepted a death benefit under the Longshoremen's and Harbor Workers' Act but failed to commence this action within six months thereafter.

Libelant takes the position that in this case there is a conflict of interest between libelant and decedent's employer, Bethlehem, and that for this reason libelant has a right to commence this action notwithstanding the statutory assignment to the employer under Sec.

933(b), citing *Czaplicki v. The Hoegh Silver Cloud,* 351 U.S. 525 (1955) and *Johnson v. Sword Line,* 257 F. 2d 541 (3rd Cir. 1958).

In *Czaplicki,* supra, a longshoreman filed a libel action against a shipowner and others for injuries which occurred when steps constructed by Hamilton gave way. Travelers Insurance Company was the compensation carrier for both the employer and Hamilton, a potential third-party tortfeasor. The Supreme Court held that a conflict of interest between libelant and Traveler's Insurance as subrogee to libelant's employer's assignment of the cause of action existed for the reason that an action by Travelers against defendant shipowner would be in effect an action against itself and that Czaplicki was the only person with sufficient adverse interest to bring the suit. The Court also pointed out that Travelers might be held liable upon an indemnity claim by the shipowner under the doctrine of *Ryan Stevedoring Co. v. Pan Atlantic,* 350 U.S. 124 (1955).

In these circumstances, the Court held, Czaplicki was not precluded by the statutory assignment of his right of action from enforcing those rights in an action brought by himself.

In Johnson, supra, where neither the employer nor its subrogated compensation carrier, holding the statutory assignment of claimant's cause of action, had brought suit or reassigned the right of action, the Court held that the burden of establishing a valid basis for an action was upon him—not upon the claim-

ant and, further, that where the employer was subject to suit by the alleged third party tortfeasor under the indemnification doctrine, a conflict of interest was apparent.

In *Smith v. A. H. Bull SS Co.*, 208 F. Supp. 172 (D.C. Md. 1962) the Court held that in a suit against the third party tortfeasor the burden was on it to show that no conflict of interest was a factor in the decision of the employer's compensation insurer not to bring a third party suit.

That such a conflict of interest may exist in the pending case appears from the fact that respondent herein has impleaded Bethlehem, alleging that the death of libelant's decedent arose out of acts of Bethlehem in breach of its contractual obligations to respondent and that, therefore, Bethlehem is liable to respondent for any damages resulting from such breach, including any damages which libelant may recover against respondent.

Thus, it appears from the record that, as far as respondent is concerned, any decision of Bethlehem not to sue respondent presumably arises out of the alleged negligence of Bethlehem itself, in the breach of its own warranty to respondent.

As far as respondent is concerned, it must, therefore, be held that a conflict of interest exists between Bethlehem and libelant. Therefore, libelant's exception to respondents' second defense must be sustained.

This order, however, should be without prejudice to any rights which Bethlehem, upon its appearance as

an impleaded party herein, may see fit to assert against any other party.

Defendant will prepare, serve and present a formal order in accordance with this memorandum.

Dated, June 11th, 1963.

W. T. Sweigert,
United States District Judge.

Original filed June 11, 1963,
Clerk, U. S. Dist. Court,
San Francisco.

United States Court of Appeals
For the Ninth Circuit

---

| | |
|---|---|
| Earline Allen, as Administratrix of the estate of Jessie Delton Allen, deceased, and Earline Allen, individually, Appellant, vs. The United States of America, a sovereign nation, Appellee. | No. 18,749 |

On Appeal from the United States District Court
for the Northern District of California,
Southern Division.

---

Before: HAMLEY, JERTBERG and BROWNING, Circuit Judges.

JERTBERG, Circuit Judge:

On July 19, 1963, the District Court ordered the dismissal of appellant's libel against the United States, upon the ground that the libel was not filed within the limitation period prescribed by Section 340(3) of the Code of Civil Procedure of the State of California.[1]

---

[1] § 312, California Code of Civil Procedure.
"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of

Appellant filed a timely appeal from such order. This court has jurisdiction to review such order pursuant to 28 U.S.C. § 1291.

Jurisdiction of the District Court was invoked under the Public Vessels Act [46 U.S.C. § 781]; the Suits in Admiralty Act [46 U.S.C. § 741 et seq.], and under the general Maritime Law, by a libel claiming damages against the United States for wrongful death arising out of injuries occurring in the territorial waters of the State of California.

The facts relevant to this appeal are not in dispute and may be summarized as follows: Appellant [libelant] is the widow of, and the administratrix of the estate of, Jessie Delton Allen, the decedent. The libel alleges that on July 18, 1961, decedent was employed by the Bethlehem Steel Corporation as a seaman, in the capacity of a ship's painter, and was at said time working aboard the U.S.N.S. GENERAL EDWIN D. PATRICK, a public vessel of the United States. The injuries occurred when the decedent fell from a scaffold while painting said vessel. The vessel was in drydock and undergoing repairs in the yard of decedent's employer, Bethlehem Steel Corporation. The decedent died as a result of said injuries on July 26, 1961. It is

---

action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

"§ 335. PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

"§ 340. *One year*

"1. • • •.

"2. • • •.

"3. • • •. An action for • • • the death of one caused by the wrongful act or neglect of another, • • •."

alleged that the injuries were caused by the negligence of the United States and the unseaworthiness of its vessel. On January 9, 1963, the libel herein was filed by the appellant, more than one year but less than two years from the date of decedent's death.

Appellant specifies that the District Court erred in holding that the one year limitation period set forth in §340(3) of the Code of Civil Procedure of the State of California is applicable to the libel.

Before considering appellant's specification of error we shall briefly review relevant, well-established principles of Maritime Law:

No action for wrongful death will lie under general Maritime Law. *The Harrisburg,* 119 U.S. 199 (1886); *The Tungus v. Skovgaard,* 358 U.S. 588 (1959); *Hess v. United States,* 361 U.S. 314 (1960). Such an action must be based upon some applicable federal or state statute. *The Harrisburg, supra; The Tungus v. Skovgaard, supra; Hess vs. United States, supra.* Federal statutes creating cause of action for wrongful death in admiralty are the Death on the High Seas Act [46 U.S.C. § 761 et seq.], and the Jones Act [46 U.S.C. § 688].

The Jones Act gives a seaman a right of action only against his employer. *The Norland,* 101 F.2d 967 (9th Cir. 1939); *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949).

The Death on the High Seas Act does not apply when death occurs within the territorial waters of a state. *The Tungus v. Skovgaard, supra.*

Where death results from a maritime tort committed on navigable waters within a state, whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. *Hess v. United States, supra; Levinson v. Deupree,* 345 U.S. 648 (1953); *Western Fuel v. Garcia,* 257 U.S. 233 (1921); *United States v. Lauro,* 330 U.S. 446 (1947). Jurisdiction of such an action against the United States is founded upon the Public Vessels Act [46 U.S.C. §§ 781-790],[2] and the Suits in Admiralty Act [46 U.S.C. §§ 741-752].[3] *American Stevedores v. Porello,* 330 U.S. 446 (1947).

The Public Vessels Act was only intended "to impose on the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed by the admiralty law on the private shipowner. . . ." *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 (1963); *Canadian Aviator, Ltd. v. United States,* 324 U.S. 215 (1945). It is not the purpose of the Public Vessels Act "to give rights of action against public

---

[2] 46 U.S.C. § 781:

"A libel in personam in admiralty may be brought against the United States, • • •, for damages caused by a public vessel of the United States, • • •."

46 U.S.C. § 782:

"Such suit shall be brought in the district court of the United States for the district in which the vessel, • • • charged with creating the liability is found within the United States, • • •. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, • • •."

[3] 46 U.S.C. § 745:

"Suits as authorized by this chapter may be brought only within two years after the cause of action arises: • • •"

vessels in cases not previously cognizable in admiralty against private vessels, the purpose of the Act being only to remove the defense of sovereign immunity." *State of Maine v. United States*, 134 F.2d 574 (1943), C.D. 319 U.S. 772 (1943).

It is clear under the general principles of law above cited that no action for wrongful death will lie under the general Maritime Law and that it is well established that admiralty will recognize and enforce such a right of action when the act causing death occurs within the navigable waters of a state whose statutes give a right of action for wrongful death.

The law of California gives a right of action for wrongful death. [Code of Civil Procedure, § 377].[4]

Appellant concedes that the libel was not filed within the time required by § 340(3) of the California Code of Civil Procedure. Appellant contends, however, that the applicable limitations period was not the one year period set forth in § 340(3), but is the two year limitation set forth in the Suits in Admiralty Act [46 U.S.C. § 745].

We are of the opinion that the District Court properly dismissed appellant's libel on the ground that appellant's cause of action was barred by the provisions of § 340(3) of the California Code of Civil Procedure, and since that court expressed its conclusion on this

---

[4]C.C.P. § 377.

"When the death of a person not being a minor, • • • is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death • • •."

point in a thorough and carefully reasoned, unreported memorandum with which we agree, we include in this opinion the hereinafter quoted portion of that memorandum.

> "Although it has been held that the limitations period of the Suits in Admiralty Act is incorporated by reference into the Public Vessels Act, for certain purposes (Phalen v. United States, 32 F.2d 687 (2d Cir. 1929)), it has also been held that the state statute of limitations applies when the admiralty court is proceeding under a state created cause of action for wrongful death.
>
> "This has been specifically held in *Western v. Garcia, supra,*" [257 U.S. 233 (1921)],[5] "(a maritime wrongful death suit between private parties), and in *California Casualty v. United States*, 74 F.Supp. 401 (S.D.Cal. 1947), (a similar suit against the United States, under the Public Vessels Liability Act).
>
> "Each of these wrongful death cases involved the identical California Statute of Limitations here in question. (See also: Mejia v. United States, 152 F.2d 686 (5th Cir. 1945); The Tungus v. Skovgaard, 358 U.S. 588, 592 (1958); Hess v.

---

[5]On certificate from and certiorari to the Court of Appeals for the Ninth Circuit, and reversing, see *Western Fuel v. Garcia*, 255 F. 817 (1919) and 260 F. 839 (1919). In both cases the Ninth Circuit held: (See 255 F. at page 820):

> "The right of action for the death of the deceased being given by a statute of the state, a court of admiralty will enforce it (authorities supra), but enforce it in accordance with the recognized principles of maritime law, unaffected by the provisions of any state or local law. Otherwise one admiralty court might readily be required to rule one way upon a certain state of facts, and another to rule another way upon a precisely similar state of facts, depending upon conflicting state or local law, thus working the practical destruction of a uniform maritime law."

United States, 361 U.S. 314, 329 (1959); Continental Casualty v. The Benny Skou, 200 F.2d 245 4th Cir. 1952); McMahon v. Pan-American, 297 F.2d 268 (5th Cir. 1962)).

"The rationale of these cases is that in actions for wrongful death brought in admiralty in which the Court must look to and follow a state created right of action for such death, the Court must adopt and enforce such right as an integrated whole with whatever conditions and limitations the creating state has attached.

"Libelant relies on *State of Maryland v. United States,* 165 F.2d 869 (4th Cir. 1947), a non-maritime action for wrongful death brought under the Federal Tort Claims Act, 28 U.S.C. Sec. 1346(b), which authorizes actions for damages against the United States in tort cases where the United States, if a private person, would be liable to the claimant under the law of the place where the act or omission occurred.

"It was held that for reasons of statutory interpretation the limitations period of the Tort Claims Act, itself, rather than the state limitations period, is applicable to such suits. (See also, Sweet v. United States, 71 F. Supp. 863 (S.D. Cal. 1947)).

"In State of Maryland, supra, at 874 however, the Court citing Mejia v. United States, supra, noted that a different rule is applicable to maritime wrongful death actions for the reason that admiralty may not adopt a state law without adopting its limitations and conditions.

"Libelant further argues that the cases which have established this admiralty rule (The Harrisburg, supra, [119 U.S. 199 (1886)], Western v.

Garcia, supra, Mejia v. United States, supra) contain language indicating that their holdings were based upon the ground that the state statutes of limitations there involved were deemed to be limitations upon the right of action, itself, as distinguished from bar to the remedy.

"Libelant points out that the California Court in Wohlgemuth v. Meyer, 293 Pac. 2d 816 (D.C.A. 1956) has held that its wrongful death one year limitation statute, C.C.P. Sec. 340(3), being a bar to the remedy, rather than a limitation upon the right of action itself and being therefore, procedural, can be tolled for reasons that would toll other statutes of limitation.

"However, the mere description of a state statute of limitations as procedural for some purpose is not necessarily a determination of the question whether a federal or a state rule of limitation should apply when the federal court's adjudication is dependent on the existence of a state created right. The real test is not whether a state statute of limitations is deemed a matter of procedure in some sense, but whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the state, is enforced or whether such statutory limitation is a matter of substance in the aspect relevant to a particular problem, namely, does it significantly affect the result of litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties as a state court. (Guaranty Trust v. York, 326 U.S. 99 (1945)).

"Although the pending suit is not a diversity case, as was Guaranty, it is a suit in which the

federal court sitting in admiralty, is dependent for its adjudication upon a state created right of action for wrongful death. The foregoing test is, therefore, applicable and, when applied it leads to only one conclusion, namely, that the California limitations statute, which is certainly a bar to the remedy (absent circumstances tolling it) does significantly affect the result of litigation and is not of a mere remedial character. Therefore, admiralty, which under the decisions 'must enforce the right as an integrated whole with whatever conditions and limitations the creating state has attached', (Tungus v. Skovgaard, supra) must apply the state statute of limitations applicable to the state created wrongful death right of action."

The order of the District Court is affirmed.

United States Court of Appeals
For the Ninth Circuit

| | |
|---|---|
| Earline Allen, as Administratrix of the estate of Jessie Delton, Allen, deceased, and Earline Allen, individually,<br>Appellant,<br>vs.<br>The United States of America, a sovereign nation,<br>Appellee. | No. 18,749 |

JUDGMENT

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 5, 1964.